of **Mallal's Supreme Court Practice,** 2nd. Edn.).

In the summons in chambers for a garnishment order *nisi* the summons need to be made only *ex-parte* supported by an affidavit in Form 99 which must satisfy the requirements of paragraphs (a) and (b) of r. 2 of O. 49. Looking at the affidavits filed in support of the summons in chambers I was satisfied that JC has satisfied the requirements of paragraphs (a) and (b).

In the circumstances of this case I was satisfied that the Senior Assistant Registrar has properly exercised her discretion when granting the orders *nisi*. The application to set aside or quash the orders *nisi* was therefore dismissed with costs.

In the application for a stay of all proceedings/ actions to execute the judgment obtained on 30 May 1993 against the defendant until the outcome of the appeal, Kuan Ee Leong, the Chairman of the defendant filed an affidavit in support thereof. From his affidavit, he deposed that the execution of the judgment would jeopardise the projects presently undertaken by the defendant. It was further deposed that in the event that the defendant succeeds on appeal, the plaintiff would not be in a position to pay the defendant as the paid up capital of the plaintiff was small. According to the defendant there are special circumstances to support the application for an order of stay. Quite apart from these grounds, the defendant also contended that there are strong grounds in the appeal to the Supreme Court. This contention is not supported at all in the affidavit. In any event the order of stay is a discretionary power vested in the Court taking into consideration the circumstances of the case. The Counsel for the plaintiffs intimated his agreement for a conditional order to be made and left it to the discretion of the Court. The solicitor for the defendant did not agree as the sum to be deposited would be too high for the defendant to raise. In all the circumstances of the case I was of the view that this would be a proper case for me to make a conditional order. I therefore accordingly made an order of stay on condition that the defendant do deposit in Court a sum of RM900,000 or bank guarantee of equivalent amount on or before two months from date of the order. Costs to be in the cause. I also duly certified that I require no further argument.

PAN GLOBAL INSURANCE SDN. BHD.

v.

ARJUNAN A/L MANICKAM & ANOR.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 12-8-92 (91)]
30 DECEMBER 1993

TORT: Recovery summons against Insurance Company, the appellant for interest due under judgment sum for general and special damages - Claim by respondents were for damages for injuries and loss suffered as a result of an accident - Respondents filed two recovery summons against appellant - First recovery summons did not include interest on the judgment sum - Second recovery summons was for interest on the general and special damages - Whether doctrine of res judicata applies to the second recovery summons - "cause of action estoppel".

In this case, the respondents have filed two recovery summons against the appellant Insurance Company. On 5 January 1990 judgment was given in favour of the respondents in the sum of RM99,213.33 with interest and costs in respect of the claim for injuries and loss suffered by the respondents arising out of an accident on 13 November 1981. The first recovery summons was filed on 25 August 1990 against the appellant for the sum of RM101,812.26 and judgment was given in favour of the respondents. On 22 February 1991, the respondents filed another recovery summons against the appellant wherein the claim was for recovery of interest both special and general damages amounting to RM20,223.50 which they had inadvertently overlooked to claim in the first recovery summons. The Sessions Court, Taiping, gave judgment to the respondents in respect of the second recovery summons. Hence, this appeal against the judgment in respect of the second recovery summons.

Held:

[1] On perusal of the appeal record, the Sessions Judge had considered all the points raised by both parties and had correctly applied the law to the facts in coming to the conclusion that there was no merits in the appellant's arguments.

[2] The appeal was dismissed with costs.

[Appeal dismissed with costs].

Cases referred to:
Fidelitas Shipping Co. Ltd. v. V/O Exportchleb [1966] 1 QB 630 ***(refd)***
Thoday v. Thoday [1964] 1 All ER 341 ***(refd)***
Tynte v. Buller [1854] 23 L J Ch. 504; 2 WR 309 ***(cit)***
Nasri v. Mesah [1971] 1 MLJ 32 ***(refd)***
Jefford v. Gee [1970] 1 All ER 1202 ***(cit)***

Legislation referred to:
Road Transport Act 1987, s. 96

Other sources referred to:
Halsbury's Laws of England, Vol. 15, p. 188

For the plaintiffs - C.V. Prabhakaran; M/s. Prabha & Associates
For the defendant - Khairuddin Alaudin; M/s. Bala Mahesan

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:
The first respondent/plaintiff as owner of motorcycle AAA 1421 rode the said motorcycle with his wife, the second respondent/plaintiff as pillion rider, on 13 November 1981 at about 8.00 p.m. along the stretch of Kamunting town towards Jalan Kamunting Jaya. The appellant/defendant carried on an insurance business and provided insurance coverage to motorcar AAM 4274 for the period beginning with 22 January 1981 till 22 January 1982 *vide* cover note no: 6018459. There was an accident between the motorcycle AAA 1421 ridden by the first respondent/plaintiff with the second respondent/plaintiff as pillion rider and motorcar AAM 4274 driven by Liew Yeet Kong as servant or agent of Liu Yoke Leng along Kamunting/Jalan Kamunting Jaya. As a result of the accident both the respondents/plaintiffs sustained injuries and incurred damages and they filed a claim against the driver and owner of motorcar AAM 4274 in the Sessions Court, Taiping, Perak *vide case no: SCJ 63-210-88*. The case was heard and disposed of by the Sessions Court, Taiping, Perak on 5 January 1990 wherein judgment was given in favour of the respondents/plaintiffs in the sum of RM99,213.33 with interest and costs.

Since the driver and owner of motorcar AAM 4274 failed to pay that judgment sum as obtained on 5 January 1990, the respondents/plaintiffs filed a summons on 25 August 1990 against the appellant/defendant *vide Summons case no: 50-43-90* in the Sessions Court, Taiping, Perak for the sum of RM101,812.26 as recovery of the award *in case no: SCJ 63-210-88*. Judgment was given in favour of the respondents/plaintiffs.

On 22 February 1991, the respondents/plaintiffs filed another recovery summons against the appellant/defendant *vide summons No: 52-12-91* wherein the respondents/plaintiffs claimed for recovery of interests for both special and general damages amounting to RM20,223.50 which they had inadvertently overlooked in *summons case No: 50-43-90*. The Sessions Court, Taiping, Perak gave judgment to the respondents/plaintiffs in the second recovery summons *vide summons no: 52-12-91* and it is from this decision that the appeal now lies before me.

It was contended by Counsel for the appellant/defendant that the first recovery *summons no: 50-43-90* are related to the second recovery *summons No: 52-12-91* as they arose out of and in pursuance of s. 96 of the Road Transport Act 1987 and, consequently, the respondents/plaintiffs are prevented by the doctrine of *res judicata* from bringing another action based on the same cause of action. Put in another way, the appellant/defendant is pleading "cause of action estoppel" which Lord Denning MR explained in *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1966] 1 QB 630 especially at p. 640 as:

> ... if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause.

In another part of his judgment in the *Fidelitas Shipping* case, Lord Denning MR had this to say:

> And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances.

Halsbury's Laws of England, Vol. 15, at p. 188 explains the doctrine of *res judicata* in this way:

> The defence of "judgment recovered", arising as it does out of *res judicata*, has much in common with estoppel by record, though it is

> not founded upon it. A plaintiff who has once sued a defendant to judgment cannot, while the judgment stands, although unsatisfied, sue him again for the same cause, not because he is estopped from doing so (though he, as well as the defendant, is estopped from averring anything contrary to the record), but because the cause of action is merged in the judgment, which creates an obligation of a higher nature. It is also probably true to say that a person who has once recovered judgment for a sum of money is estopped from averring that he ought to recover any further sum for the same cause of action.

On estoppel per *rem judicatam*, Lord Diplock LJ in *Thoday v. Thoday* [1964] 1 All ER 341, 352 had this to say (see the headnotes):

> This is a generic term which in modern law includes two species,
>
> (i) "cause of action estoppel", which prevents a party to an action asserting or denying as against the other party the existence of a particular cause of action, and
> (ii) "issue estoppel", which arises where the establishing of a cause of action requires proof of several conditions and one of these has been determined between the parties in prior litigation before a competent court; and "issue estoppel" must not be confused with "fact estoppel" which, although a species of estoppel *in pais*, is not a species of estoppel *per rem judicatam*."

In the Sessions Court, Counsel for the respondents/plaintiffs argued that in support of the second recovery *summons no: 52-12-91* an affidavit was filed and affirmed on 10 April 1991 but there was no reply to this affidavit and such failure should be construed against the appellant/defendant. This argument was well received by the Sessions Judge. It is now trite law that where a case is to be decided on a contest of affidavits, the rule is that material allegations which are not contradicted are deemed to be admitted (see *Tynte v. Buller* [1854] 23 LJ Ch. 504; 2 WR 309 for further treatment on the subject). Thus, on perusal of the affidavit affirmed on 10 April 1991, the respondents/plaintiffs have set out in detail particulars of the interests on special and general damages together with the quantum. That should have alerted the appellant/defendant to action by, at least, filing an affidavit in reply. But alas, this was not to be.

Now, it would be prudent to take stock of the situation. Since the objection of the appellant/defendant proceeds on the ground that the cause of action in both the recovery summons are the same, with which contention the respondents/plaintiffs do not agree, it would be appropriate to ask: What is a "cause of action?" I am guided, fortunately, by the decision of the then Federal Court in the case of *Nasri v. Mesah* [1971] 1 MLJ 32 especially at p. 34 where Gill FJ said:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v. Brown* [1889] 22 QBD 128, 131).... In *Board of Trade v. Cayzer, Irvine & Co.*, [1927] AC 610, 627, Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach ....

On perusal of *case no: SCJ 63-210-88*, recovery *summons No: 50-43-90* and the recovery *summons No: 52-12-91*, and bearing in mind that the doctrine of *res judicata* is not an inflexible rule, it is clear that the entire set of facts that gives rise to an enforceable claim would be the injuries and damages sustained by the respondents/plaintiffs as a result of the road accident. It is a running down action. It is now trite law that interest on special damages in a running down action may be fairly averaged out at half the usual rate of interest from the date of accident to the date of judgment (see *Jefford v. Gee* [1970] 1 All ER 1202), thus, Counsel for the respondents/plaintiffs applied the conventional rate at 4% (see the affidavit affirmed on 10 April 1991). And applying the conventional rate of interest of 8%, Counsel for the respondents/plaintiffs sought for this percentage in regard to the interest on general damages in a running down action. Without a doubt, interests on special and general damages go hand in hand and forms part and parcel of a running down action. They are inseparable.

On perusal of the appeal record, the Sessions Judge had considered all the points raised by both parties and had correctly applied the law to the facts in coming to the conclusion that there were no merits in the appellant/defendant's arguments. I do not propose to interfere and, accordingly, I would dismiss the appeal with costs.